Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ARNOLDO LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does counsel's failure to file a motion to suppress a videotaped confession constitute ineffective assistance of counsel and thus render a guilty plea involuntary?

2. Does counsel's failure to object to either of two separate upward enhancements to a criminal defendant's sentence, despite the complete absence of credible evidence to support such enhancements, constitute ineffective assistance of counsel?

3. Was counsel's overall performance constitutionally deficient under the *Cronic* standard?

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STATEMENT OF JURISDICTION

The court of appeals entered judgment denying Lopez's ineffective assistance of counsel claims on May 26, 2006. A timely petition for rehearing was denied on June 23, 2006. (*See* Appendix C). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment, U.S. Constitution, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. The statutes under which Petitioner was prosecuted, though nothing turns on their terms, were 21 U.S.C. §§ 841(a)(1) and (b)(1)(c) and 18 U.S.C. § 2.

21 U.S.C. § 841(a) and 28 U.S.C. § 841(b)(1)(C) are reprinted as Appendix D.

18 U.S.C. § 2 states:

> **(a)** Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> **(b)** Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

This case involves important questions of constitutional law that require this Court to determine if counsel's complete failure to advise his client on the possibility of a motion to suppress an involuntary confession and failure to file a motion to suppress an involuntary confession constitutes constitutionally ineffective assistance of counsel. This Court also should determine whether counsel's failure to object to either of two separate upward enhancements to a criminal defendant's sentence, despite the complete absence of credible evidence to support such enhancements, constitutes ineffective assistance of counsel. The Court of Appeals's decision in this case conflicts with decisions by this Court

and other courts of appeal regarding the application of the *Strickland* and *Cronic* standards.

A. Petitioner's Conviction and Direct Appeal

This is an appeal of a conviction and sentence under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2. On September 8, 2004, Petitioner was charged by information for knowingly, intentionally, and unlawfully distributing heroin, aided and abetted by other persons, that caused the death of Tracey Leigh Crossett. RE-3:1. The information also alleged the possession of a firearm as an aggravating factor. RE-3:1. Lopez unknowingly waived his right to an indictment and pled guilty to the charges before the federal magistrate. 1R:34,35.

Under the terms of Lopez's plea agreement, his prior counsel allowed Lopez to waive his right to appeal his sentence on any ground, other than for ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension, and also waive his right to contest his sentence or the manner in which it was determined in any post-conviction proceeding, including but not limited to, a proceeding under 18 U.S.C. § 2255. RE-5:3-4. Lopez's prior counsel also allowed Lopez to waive his right to have the facts that determine his offense level under the Federal Sentencing Guidelines proven beyond a reasonable doubt, instead allowing the court to consider all reliable evidence, including hearsay, to find the facts that determine the sentence level by a preponderance of the evidence. RE-5:3.

On April 15, 2005, the district court conducted a sentencing hearing. 3R:1. At the hearing, the court sentenced Lopez to 420 months (35 years) confinement to be followed

by 12 years of supervised release after accepting the Government's motion to depart from below the statutory minimum of life imprisonment. RE-4:2, 3. The court also ordered a fine of $10,000 (with interest waived) and a special assessment of $100. RE-4:6.

Lopez became aware of his former counsel's ineffective assistance sometime before his sentencing hearing. Lopez wrote the court asking for new counsel on November 8, 2004. RE-8:1. In his request for new counsel, Lopez specifically stated:

> This letter serves to document the fact that I am requesting to release my existing counsel ... from my representation due to the fact that he has not followed my wishes. He and I have had a conflict of interest from day one.... I feel as though there has been major damage done in my case because of my attourney [sic].

RE-8:1. The district court held a hearing to consider Lopez's request, at which time Lopez was persuaded to keep his former counsel. 1R:51.

Lopez continued to believe his former counsel was ineffective and again informed the court of his counsel's ineffectiveness on April 20, 2005, after he received his sentence. RE-8:2. In this letter, Lopez again emphasized his discontent with his former counsel, specifically expressing his frustration with his former counsel for failing to file objections on his behalf. RE-8:2-3. It was only after this second letter that a formal request for new counsel was filed in the district court and the court appointed new counsel for Lopez. 1R:86,100. By then, serious damage had already been inflicted to Lopez's defense.

B. The Court of Appeals's Decision

Lopez timely filed a notice of appeal and appealed the conviction based on ineffective assistance of counsel. RE-2:1. On May 26, 2006, the Fifth Circuit denied Lopez's appeal on the basis that the record was not sufficiently developed to determine whether counsel was constitutionally ineffective. *See* Appendix A.

REASONS FOR GRANTING THE PETITION

Viewed in its entirety, former counsel's representation of Lopez throughout the course of the district court proceedings rose to the level of ineffective assistance of counsel. As recognized by this Court on countless occasions, legal representation falling well below the threshold standard violates a defendant's constitutional rights. Due to the severity of the lapses in representation on the part of former counsel and the Fifth Circuit's failure to properly consider these claims, this Court should grant this petition for certiorari.

I. The Fifth Circuit's Decision Conflicts with Numerous Other Circuit Court Decisions Finding Records Sufficiently Developed to Determine an Ineffective Assistance of Counsel Claim

Lopez's former counsel's failure to file a motion to suppress Lopez's videotaped confession constitutes ineffective assistance of counsel under both the *Cronic* and *Strickland* tests. The Fifth Circuit has found that "[w]hen a criminal defendant receives no meaningful assistance from his court-appointed lawyer, he is constructively denied his Sixth Amendment right to counsel and need ***not*** prove [*Strickland*] prejudice." *Gochicoa v. Johnson*, 238 F.3d 278,

284 (5th Cir. 2001) (emphasis added). However, the Fifth Circuit ignored its own precedent when it determined that the record in this case was insufficiently developed to determine if Lopez received ineffective assistance of counsel.

a. The Fifth Circuit Ignored Case Law Finding the Record Sufficiently Developed for Considering Ineffective Assistance of Counsel Claims on Direct Appeal

The court of appeals typically will not review a case for ineffective assistance of counsel for the first time on direct appeal because of the lack of an opportunity to fully develop the record on the merits of the claims. However, in special cases, courts have found the record sufficiently developed to make a determination on the merits of an ineffective assistance of counsel claim. *See, e.g., United States v. Labrada-Bustamante*, 428 F.3d 1252, 1260–61 (9th Cir. 2005); *United States v. Phillips*, 664 F.2d 971, 1040 (5th Cir. 1981); *United States v. Porter*, 431 F.2d 7, 11 (9th Cir. 1970). The Fifth Circuit ignored this established case law and departed from the accepted and usual course of judicial proceedings in finding the record in this case insufficiently developed to determine whether Lopez's former counsel was constitutionally ineffective.

In *Phillips*, the defendant filed a single letter with the district court expressing his concern over his counsel's ineffective assistance. Moreover, in *Phillips*, the defendant waited until after his trial and after the jury had found him guilty before bringing his concerns to the district court's attention. *Phillips*, 664 F.2d at 1040. Unlike in *Phillips*, however, Lopez ***actually and repeatedly*** complained to the court about his attorney's inaction and conflict of interest before his guilty plea and before his sentence.

Lopez also filed multiple letters stating his complaints. RE-8:1. Lopez wrote the court asking for new counsel on November 8, 2004. RE-8:1. In his request for new counsel, Lopez specifically stated:

> This letter serves to document the fact that I am requesting to release my existing counsel ... from my representation due to the fact that he has not followed my wishes. He and I have had a conflict of interest from day one.... I feel as though there has been major damage done in my case because of my attourney [sic].

RE-8:1.

Lopez continued to believe his counsel was ineffective and again complained of his counsel's inactions and conflict of interest. RE-8:2. In this letter, Lopez again emphasized his discontent with his former counsel, specifically expressing his frustration with his former counsel for failing to file objections on his behalf. RE-8:2-3. Lopez, therefore, made even more of an effort than the defendant in *Phillips* to guarantee his right to effective assistance of counsel and each of his efforts are clearly documented in the record.

Moreover, the Fifth Circuit also ignored prior case law finding that counsel's failure to object to a defendant's Pre-Sentence Report is sufficient to find a record sufficiently developed for the court to review the defendant's ineffective assistance of counsel claims on direct appeal. *See United States v. Labrada-Bustamante*, 428 F.3d 1252, 1260-61 (9th Cir. 2005) (finding the record's reflection that counsel's failure to object to pre-sentence investigation report in writing

was sufficient to make the case reviewable for ineffective assistance claims on direct appeal). As such, the Fifth Circuit ignored settled jurisprudence and departed from established case law in dismissing Lopez's ineffective assistance of counsel claims without addressing the merits.

b. The Fifth Circuit Ignored Cases Finding that A Single Serious Error Can Support a Claim of Ineffective Assistance

In denying Lopez relief, the Fifth Circuit also ignored established case law finding that a single, serious error can support a claim of ineffective assistance of counsel. *E.g.*, *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986); *United States v. Cronic*, 466 U.S. 648, 657 (1984).[1]

1. Failure to File a Motion to Suppress an Involuntary Confession Constitutes Ineffective Assistance of Counsel

It is well-established that the failure to file a pre-trial motion to suppress falls "outside the wide range of professionally competent assistance" unless there is a tactical

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1. Admittedly, not every slip in legal advocacy constitutes ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). Nevertheless, courts, including the Fifth Circuit, have not hesitated in finding ineffective assistance based on isolated, but important, errors. *E.g.*, *Mason v. Hanks*, 97 F.3d 887, 891-902 (7th Cir. 1996); *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995); *Jackson v. Herring*, 42 F.3d 1350, 1358-62 (11th Cir. 1995); *Mayo v. Henderson*, 13 F.3d 528, 533-36 (2d Cir. 1994); *Gray v. Lynn*, 6 F.3d 265, 268-71 (5th Cir. 1993); *Dawan v. Lockhart*, 980 F.2d 470, 473-75 (8th Cir. 1992).

reason for the decision not to pursue a motion to suppress. *Kirkpatrick v. Butler*, 870 F.2d 276, 283 (5th Cir. 1990); *see also Kimmelman*, 477 U.S. at 374-75 (1986). Lopez's former counsel failed to file a motion to suppress Lopez's videotaped confession despite knowledge of the video and knowledge of the contents of the video. Moreover, the record indicates that due to a tactical disconnect between Lopez and his former counsel, no strategic decision with regards to a motion to suppress could have been made. *See* RE-8:1, RE-8:2. Lopez's letters to the district court during the course of his proceedings clearly show that Lopez's former counsel ignored Lopez's wishes and failed to file objections on Lopez's behalf.

Further, in *Kirkpatrick v. Butler*, 870 F.2d 276, 283 (5th Cir. 1990), the Court admonished that "any competent attorney exercising reasonable professional judgment" should "challenge[] the admissibility" of a confession. The *Kirkpatrick* court found that counsel's failure to move for suppression of damaging evidence seized at defendant's apartment was "outside the wide range of professionally competent assistance" even though the motion would have been denied. *Id.* Underlying the *Kirkpatrick* reasoning is the principle that moving to suppress such confessions is a baseline function of criminal defense counsel. Had Lopez's former counsel properly filed a motion to suppress Lopez's videotaped confession, there is more than a reasonable probability that Lopez would not have plead guilty and would have instead insisted on going to trial.

Even assuming arguendo that Lopez's former counsel made a strategic decision not to file a motion to suppress Lopez's videotaped confession, the decision was a unilateral decision made without the consent or knowledge of his client.

If such is the case, ineffective assistance of counsel is even more clearly shown because Lopez's counsel did not even give his client the opportunity to make a decision. A strategic decision, such as whether to file a motion to suppress, may be made only once the defendant's counsel gives advice and full information to the defendant. *See Bradbury v. Wainwright*, 658 F.2d 1083, 1087 (5th Cir. 1981).

2. Failure to Discuss the Possibility of a Motion to Suppress an Involuntary Confession Constitutes Ineffective Assistance of Counsel

Not only did former counsel fail to file a motion to suppress the confession, he also failed to even discuss the possibility of a motion to suppress with Lopez. Consequently, Lopez's former counsel failed to aid him in a critical stage of proceedings, leaving Lopez with no meaningful assistance of counsel. Lopez, therefore, was forced to "navigate a critical stage of the proceedings against him without the aid of 'an attorney dedicated to the protection of his client's rights.'" *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997) (quoting *United States v. Swanson*, 943 F.2d 1170, 1175 (9th Cir. 1991)). This Court has noted:

> Representation of a criminal defendant entails certain basic duties. . . . [These include] the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.

Strickland, 466 U.S. at 688. Even a cursory investigation into the circumstances of the videotaped confession and

criminal procedural law would have revealed to Lopez's former counsel that the confession could be suppressed. His failure to look into this possibility and discuss it with his client clearly shows a deficiency in former counsel's professional judgment amounting to ineffectiveness. *See Herring*, 491 F.2d at 128-29 ("By failing to advise Herring how the facts of his case related to the Texas law of robbery, counsel made certain that his client's plea could not be knowingly and voluntarily entered."). Consequently, Lopez was constructively denied the meaningful assistance of counsel. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932), *cited by Cronic*, 466 U.S. at 660-61 (finding that a defendant is denied meaningful assistance when he is deprived of "the guiding hand of counsel" at a critical stage of the proceedings).

This Court has made clear that one of the basic duties of counsel to a criminal defendant is "to keep the defendant informed of important developments in the course of prosecution." *Strickland*, 466 U.S. at 688. Additionally, the Fifth Circuit has repeatedly stated that "one of the most precious applications of the Sixth Amendment may well be in affording counsel to advise a defendant concerning whether he should enter a plea." *Reed v. U.S.*, 354 F.2d 227, 229 (5th Cir. 1965); *see also Goodwin v. Smith*, 439 F.2d 1180, 1182 (5th Cir. 1971) ("Of course, an indigent accused is entitled to be represented by counsel . . . when making a plea of guilty unless he intelligently and competently waives that right."); *Davis v. Holman*, 354 F.2d 773, 776 (5th Cir. 1965) (holding that "the change by [a defendant] of his plea from not guilty to guilty [is] a critical stage in the proceedings against him for which he [is] entitled to counsel."); *Harvey v. Mississippi*, 340 F.2d 263, 269 (5th Cir. 1965) (stating that "[o]ne accused of a crime has the right to the assistance of counsel before

entering a plea because of the disadvantageous position of an unassisted layman in a court of law and because of the serious consequences which may attend a guilty plea.").

When, as here, counsel fails to inform his client of all his legal options before entering into a plea, counsel fails to fulfill his Sixth Amendment obligations. *See Bradbury*, 658 F.2d at 1087,

> [I]t is defense counsel's duty to assist actually and substantially the defendant in deciding whether to plead guilty and to ascertain whether the plea is entered knowingly and voluntarily. . . . Counsel must be familiar with the facts and the law in order to advise the defendant meaningfully of the options available. . . . This includes the responsibility of investigating potential defenses so that the defendant can make an informed decision.

Id. (citations omitted).

It is well-established that a defense counsel's duty to fully inform his client includes advising the defendant of the options that are available. *E.g.*, *Mason v. Balcom*, 531 F.2d 717, 724 (5th Cir. 1976); *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974). The options available to Lopez included filing a motion to suppress his confession; however, by all accounts, Lopez's counsel failed to discuss this option with him. In acting in such an unreasonable and professionally incompetent manner, Lopez's former counsel failed to offer Lopez meaningful assistance of counsel.

3. Failure to Object to Improper Sentence Enhancements Constitutes Ineffective Assistance of Counsel

The Fifth Circuit ignored its own established precedent in failing to address Lopez's ineffective assistance of counsel claims based on his former counsel's failure to object to improper sentence enhancements. The Fifth Circuit's decision in *United States v. Franks*, 230 F.3d 811, 814 (5th Cir. 2000), should have guided its ineffective assistance of counsel analysis.

In *Franks*, counsel for the defendant made no objection to the enhancement of his sentence, even though there was considerable case authority holding the enhancement to be improper under analogous factual circumstances. *Id.* Counsel's failure to object fell below this objective standard of reasonableness, and consequently, the defendant had satisfied the deficiency prong of his ineffective assistance of counsel claim under *Strickland. Id.* The prejudice prong was also satisfied because but for the improper enhancement, the defendant's offense level would have been reduced two points and thus, he was sentenced to three months more than the maximum permissible guideline sentence had the Sentencing Guidelines been applied properly. *Id.* at 815. Hence, the district court's error in sentencing resulted in a "specific, demonstrable increase in sentencing, and [the defendant] suffered prejudice because of it." *Id.*

Franks is not limited only to situations in which there is no legal support for an upward enhancement. As is typical, defense counsel will object to the upward enhancement of a sentence if there is patently insufficient evidence to support such an enhancement. Therefore, the Fifth Circuit failed to

apply established law in considering Lopez's ineffective assistance claims.

The law concerning the § 2D1.1 sentence enhancement is extensively developed. Section 2D1.1(b)'s commentary advises that the enhancement factor "reflects the increased danger of violence when drug traffickers possess weapons," and should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S. Sentencing Guidelines § 2D1.1 cmt. 3 (2005).

The Fifth Circuit has held that weapon possession is established if the government proves by a preponderance of the evidence that a "temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant." *United States v. Hooten*, 942 F.2d 878, 882 (5th Cir. 1991). As a general rule, "the government must provide evidence that the weapon was found in the same location where drug or drug paraphernalia are stored or where part of the transaction occurred." *Id*. In this case, because it was not "probable that the firearm was connected to the offense," the sentence enhancement was not properly applied. *United States v. Eastland*, 989 F.2d 760, 770 (5th Cir. 1993).

In *United States v. Cooper*, 274 F.3d 230, 245 (5th Cir. 2001), this Court found that the Government failed to show that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant where the vehicle was seized and nothing in the record demonstrated that the defendant used that vehicle to transport narcotics or to conduct any other activities associated with the drug conspiracy. The *Cooper* court explained that

> in cases dealing with an enhancement for possession of a firearm there has been ***evidence affirmatively linking the drug trafficking activity to the weapon or the place where the weapon was found.*** In *United States v. Brown,* this Court upheld the two-level enhancement pursuant to § 2D1.1(b)(1) where police found a shotgun in the trunk of the defendant's car during the course of their investigation. . . . Witnesses provided the necessary link between the gun and the drug trafficking by testifying that the defendant used the vehicle to transport crack cocaine. Similarly, in *Vasquez-Zamora,* guns kept at the defendant's place of business were used to enhance the sentence because the district court found that the defendant used the business as a location to store drugs and the proceeds of drug sales.

Id. at 245 (emphasis added) (citations omitted).

Cooper requires affirmative evidence closely tying the weapon to the drug-trafficking activity directly at issue. Under the *Cooper* requirement, evidence of the weapon's link to drug use or possession, without clear evidence of drug trafficking, will not be sufficient. As noted above, the § 2D1.1(b)(1) sentence enhancement was intended to deter the use of firearms during the act of trafficking, i.e., transporting or distributing, illegal narcotics. It was not intended to apply to situations, as here, where the firearm was spotted in connection with drug use or possession in one's residence. To hold otherwise would extend § 2D1.1(b)(1) beyond its intended reach, increasing the penalties for users not involved in the narcotics trade.

In this case, law enforcement officers found the firearm at-issue underneath the couch in Lopez's residence. There is no evidence whatsoever that Lopez used either the located firearm or his residence during the commission of the offense. More significantly, there is no evidence suggesting that his residence was in any way related to the drug trafficking activity at issue. While the Government may argue that the mere presence of drugs in a residence is sufficient, mere presence (or usage) alone is insufficient to demonstrate a "temporal and spatial relationship" between Lopez, the firearm, and the distribution of narcotics to Federman.

Further, even the prosecuting attorney pointed out at Lopez's sentencing hearing that the heroin found at Lopez's residence was "a very high strength" of heroin, a much higher strength than that usually found for sale on the streets. 3R:12. This information shows that the heroin found in Lopez's home was intended for personal use rather than distribution.

As in *Cooper*, the enhancement was in error because the Government did not adduce evidence revealing an actual nexus between the location of the firearm, i.e., underneath the couch in the Lopez residence, and the alleged trafficking of heroin. It cannot be said, even under the preponderance of evidence standard, that the firearm underneath the couch was related to the specific and discrete drug trafficking-activity for which Lopez was charged.

Because prior counsel asserted no objection to the sentence enhancements when the circumstances warranted such an objection, and his failure to object resulted in a prolonged sentence for Lopez, under *Franks*, the two-pronged test for ineffective assistance was met. Given the absence of evidence showing the required relationship to warrant a

sentence enhancement, prior counsel's failure to object to the improper sentence enhancement constitutes ineffective assistance of counsel. *E.g.*, *Franks*, 230 F.3d at 814. The Fifth Circuit, therefore, ignored settled law when it declined to consider Lopez's ineffective assistance claim based on his former counsel's failure to object to improper sentence enhancements.

II. The Fifth Circuit Erred in Failing to Apply the *Cronic* Standard to Find Lopez's Former Counsel Constitutionally Insufficient

Finally, Lopez's former counsel's overall performance amounted to "no meaningful assistance" and was so deficient that prejudice should be presumed under the standard enunciated in *United States v. Cronic*, 466 U.S. 648, 654-55 (1984). The Fifth Circuit ignored *Cronic* and its progeny and failed to give Lopez's ineffective assistance claims any consideration under the *Cronic* standard in contravention of well-established law.

Under the *Cronic* test, situations arise in which counsel's conduct amounts to an abandonment of meaningful assistance "*throughout* the proceeding, making 'the adversary process itself . . . unreliable,'" causing a presumption of prejudice to arise. *Quintero v. Bell*, 368 F.3d 892, 892 (6th Cir. 2004), *quoting United States v. Cronic*, 466 U.S. 648, 659 (1984). In short, the *Cronic* standard is applied when the defendant is deprived of "the guiding hand of counsel" at a critical stage of the proceedings. *Powell v. Alabama*, 287 U.S. 45, 69 (1932), *cited by Cronic*, 466 U.S. at 660-61. A plea hearing is a critical stage of proceedings, *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963), and as such Lopez was constitutionally entitled to

competent advice concerning whether he should enter a guilty plea. *Reed v. United States*, 354 F.2d 227, 229 (5th Cir. 1965). In fact several circuits have stated that "one of the most precious applications of the Sixth Amendment may well be in affording counsel to advise a defendant concerning whether he should enter a guilty plea." *Id.*

The right to the assistance of counsel at a plea hearing encompasses the right to have an advocate for one's cause. *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997). If defense counsel fails to advocate for his client in an adversarial manner, his actions fall below constitutional guarantees of assistance of counsel. *Cronic*, 466 U.S. at 656-58 ("If the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."). Accordingly, "when the defendant can establish that counsel was not merely incompetent but inert, prejudice will be presumed." *Childress*, 103 F.3d at 1230.

Lopez's former counsel committed so many errors in the form of inaction that his representation effectively amounted to no assistance of counsel at all. *See Bell v. Cone*, 535 U.S. 685, 696–97 (2002) (reaffirming *Cronic* and emphasizing that counsel's entire failure to act at a critical stage violates the Sixth Amendment). Former counsel not only failed to file a motion to suppress Lopez's confession, he also failed (1) to request Ms. Crossett's autopsy report from prosecutors, (2) to investigate whether Federman had other heroin providers, (3) to prevent his client from waiving any right to appeal his sentence, (4) to ensure that the videotape shown at Lopez's sentencing hearing was transcribed into the record, and (5) to object to improper sentence enhancements.

When defense counsel provides no actual assistance, as in this case, the constitutional guarantee of counsel is violated. *Cronic*, 466 U.S. 648, 654-55 (1984). "To find otherwise 'could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.'" *Id.* (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)).

By failing to even consider the *Cronic* standard and its applicability to Lopez's ineffective assistance of counsel claim, the Fifth Circuit ignored firmly established law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court grant the petition for a writ of certiorari in this case.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 26, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-50602
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARNOLDO LOPEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:04-CR-209-ALL

Before JOLLY, DAVIS, and OWEN, Circuit Judges.

PER CURIAM:*

Arnoldo Lopez appeals from his conviction by guilty of distribution of heroin, for which Lopez was sentenced to

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

35 years of imprisonment, a sentence less than the mandatory statutory term of life imprisonment. Lopez contends that counsel was ineffective for failing to provide accurate advice regarding the practical meaning of Lopez's appeal-waiver provision; that counsel was ineffective for failing to move for the exclusion of his videotaped confession; that counsel was ineffective for failing to object to the firearm adjustment to Lopez's offense level; and that counsel's ineffective actions, taken cumulatively, demonstrated performance so deficient that prejudice should be presumed pursuant to *United States v. Cronic*, 466 U.S. 648 (1984).

To prevail on an ineffective-assistance-of-counsel claim, an applicant must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, the applicant must show that counsel's actions "fell below an objective standard of reasonableness." *Id.* at 688. To prove prejudice, the applicant must show that "there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, and that "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

Lopez's plea agreement contained the following provision:

> The Defendant expressly waives the right to appeal his sentence on any ground, other than for ineffective assistance of counsel or prosecutorial

> misconduct of constitutional dimension. Similarly, the Defendant agrees not to contest his sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to, a proceeding under 28 U.S.C. § 2255.

Lopez misreads the waiver provision. The waiver has no effect on his ability to appeal, or seek 28 U.S.C. § 2255 relief from, his *conviction*; the provision affects only his ability to appeal, or seek § 2255 relief from, his *sentence*. Moreover, a waiver provision does not preclude an appeal or a § 2255 motion based on claims that the plea agreement or the waiver provision were tainted by ineffective assistance. *United States v. White*, 307 F.3d 336, 339 (5th Cir. 2002) (§ 2255 motion); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995) (direct appeal). However, the record in this case is not sufficiently developed for us to address on direct appeal whether counsel provided Lopez with inadequate advice regarding the waiver provision. *See United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987). The record is also undeveloped regarding Lopez's remaining ineffective-assistance contentions; we will not address those contentions on direct appeal.

AFFIRMED.

APPENDIX B — REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION FILED SEPTEMBER 13, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

A-04-CR-209 LY

UNITED STATES OF AMERICA

V.

ARNOLDO LOPEZ

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

The Magistrate Court submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b)(3). The District Court referred this case to the United States Magistrate Judge for the taking of the defendant's felony guilty plea and for his allocution pursuant to Federal Rule of Criminal Procedure 11.

On September 9, 2004, the defendant and counsel appeared before the Magistrate Court. The undersigned addressed the defendant personally in open court, informed

him of the admonishments under Rule 11 of the Federal Rules of Criminal Procedure, and determined that he understood those admonishments. Specifically, the Court admonished the defendant that the relevant statute in this case provides for a mandatory sentence of life imprisonment.

Pursuant to a plea agreement, the defendant plead guilty to a single count information charging him with distribution of a quantity of heroin resulting in the death of a seventeen year old girl, following a prior conviction for a felony drug offense, and while in possession of a firearm, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(C) and 18 U.S.C. § 2.

The Magistrate Judge finds the following:

1. The defendant, with the advice of his attorney, consented to enter this guilty plea before the Magistrate Judge, subject to final approval and sentencing by the District Judge;

2. The defendant fully understands the nature of the charge against him and possible penalties;

3. The defendant understands his constitutional and statutory rights, understands that his constitutional and statutory rights can be waived, and understands the meaning and effect of the waiver of his constitutional and statutory rights;

4. The defendant waived his right to have facts that determine his offense level alleged in an indictment and found by a jury beyond a reasonable doubt, agreed to

have the facts that determine his offense level found by the Court at sentencing by a preponderance of the evidence and that the Court may consider any reliable evidence, including hearsay, and waived any constitutional challenge to the validity of the sentencing guidelines;

5. The defendant waived his right to appeal and waived his right under 28 U.S.C. § 2255. The defendant did not waive the right to challenge his sentence to the extent that it is the result of a violation of his constitutional rights based on claims of ineffective assistance of counsel or prosecutorial misconduct;

6. The defendant's plea was made freely and voluntarily;

7. The defendant is competent to enter this plea of guilty; and

8. There is a factual basis for this plea.

RECOMMENDATION

The Magistrate Court **RECOMMENDS** the District Court accept the defendant's guilty plea and, after reviewing the presentence investigation report, enter a Final Judgment of guilt against him.

Appendix B

WARNING

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained within this Report within ten (10) days after being served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations and, except upon grounds of plain error, shall bar the party from appellate review of proposed factual findings and legal conclusions accepted by the District Court to which no objections were filed. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Am*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

The Clerk is directed to mail a copy of this Report and Recommendation to the parties by certified mail, return receipt requested.

SIGNED this 10th day of September, 2004.

s/ Robert Pitman
ROBERT PITMAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 23, 2006

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-50602

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ARNOLDO LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas, Austin Division

ON PETITION FOR REHEARING

Before JOLLY, DAVIS and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ W. Eugene Davis
United States Circuit Judge

APPENDIX D — RELEVANT STATUTE

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * *

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results

from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * * *